

Fair Political Practices Commission
MEMORANDUM

To: Interested Persons

From: Legal Division

Subject: Regulation Clarification Project: Summary of April 14, April 21, and June 9, 2011 meetings

Date: June 14, 2011

Regulation Suggestions from the June 9, 2011 meeting	
Regulations	Proposal
<u>18247.5</u> Primarily Formed and General Purpose Committees.	Revisit
<u>18401</u> Required Recordkeeping for Chapter 4.	Simplify required detail for reporting travel expenses
<u>18946.4</u> : Reporting and Valuation of Gifts: Tickets Provided by Nonprofit and Political Organizations for Their Fundraising Events	Simplify rule applicable to the gift of tickets from nonprofits. Consider adding 501(c)(4)s.
Advertising Disclosure Rules	Possibly amend statutes or regulations -- possibly organize to put all disclosure rules in one place.
Form 700	Simplify reporting
Eliminate paper filing and move to e-filing	Eliminate paper copies in favor of an unredacted second e-copies.
Other Proposals received by letter (see attached letter)	

Regulation Suggestions from the April 21, 2011 meeting	
Regulations	Proposal
<u>18215</u> Contribution	Clarify contributions to multi-purpose committees in light of Citizens United. Consider when it applies and add examples. Also, clarify what is a "behested payment."
<u>18239</u> – Definition of Lobbyist	Clarify who is a lobbyist. Original intent was to exclude persons who lobby the legislature only part time or occasionally. Clarify the new rule on placement agents
<u>18247.5</u> Primarily Formed and General Purpose Committees.	Review advice about when a major donor committee active in a city election must check its status.
<u>18360</u> Complaints	<ul style="list-style-type: none"> Information about complaints should not be transmitted to the Commissioners since they are the triers of fact and the information may be considered an ex parte communication. Respondents have no fixed response time to respond to complaints before decisions are made to send the case to full investigation. Revise the regulation to give the Respondent time to respond, similar to the FEC rule. Under (f) Executive Director makes decision to initiate investigations and governs PC hearings. Could theoretically be a conflict of interest.

<u>18361.4</u> . Probable Cause Proceedings.	<ul style="list-style-type: none"> The rules for PC hearings should govern the process for initiating civil prosecutions. The Executive Director should be charged with determining Probable Cause since the ED decides to initiate the investigation. The regulation provides no opportunity for discovery by Respondents before a PC hearing.
<u>18420.1</u> , Payments by State or Local Agencies for a Campaign Related Communication. <u>18901.1</u> . Campaign Related Mailings Sent at Public Expense.	The current regulation sets different standards for public and private actors.

Suggestions from the April 21, 2011 meeting (cont.)	
Regulation	Proposal
<u>18450.4(b)</u> . Contents of Disclosure Statements. Advertisement Disclosure	Primarily formed ballot measure committee name requirements should be revised to reduce redundant disclosures; examine advice letter.
18534 Required Committee Bank Accounts	Change names used for "restricted use account" and "all purpose account." Current names are counter-intuitive.
<u>18701(a)(2)</u> Public Official, Definitions	Take a new look at consultant disclosure requirements -- maybe enact rules similar to the University of California Principal Investigator rule in Regulation 18755(b)(2)
<u>18703.1(d)(2)(C)</u> , Economic Interest, Defined: Business Entities.	Define "controlling owner" as limited to someone with an interest of "more than 50 percent," rather than the simple "50 percent" we have now.
18734 New Positions Pending Code Adoption or Amendment	Regulation requiring immediate disclosure on assuming office seems contrary to statute and policy.
<u>18755(d)</u> -- Statements of Economic Interests: Person or Persons at an Institution of Higher Education with Principal Responsibility for a Research Project.	Remove the list describing particular non-profits as exempt, and go with the general criteria in the regulation that the University of California can apply without Commission approval. Alternatively, update list of nonprofits that are exempt.
<u>18950.4</u> Payments for Travel in Connection with Campaign Activities.	The regulation should apply to campaign staff as well. However, the six-month presumption rule may be too strict in light of the length of campaigns.
§85303(c) / <u>18534</u> Required Committee Bank Accounts.	Define costs of fundraising as "admin costs" so they can be paid from funds raised without limits.
§87311	The Conflict of Interest Code statutes and regulations appear inconsistent (for example on the required notice to employees)
§84250 et seq.	New LAFCO statute needs clarification.

April 21 General Suggestions
Review and simplify conflict of interest rules
A multi-step process for analyzing gifts similar to the 8-step process for conflicts of interest.
Reconsider the Commission's Press Policy
Group regulations by topic, not by the statute number.

Regulation Suggestions from the April 14, 2011 meeting	
Regulations	Proposal
<u>18247.5</u> Primarily Formed and General Purpose Committees.	Request to simplify the rule
<u>18401</u> Required Recordkeeping for Chapter 4.	Simplify required detail for reporting travel expenses
<u>18431</u> Reporting of Expenditures by an Agent or Independent Contractor	Credit card vendor itemization -- proposal to raise the threshold to \$500
<u>18466</u> State Ballot Measure Contributions & Expenditures; Online Reports	Narrow the definition of committees that fall within the rule
<u>18942(a)(7)(A)</u> Exceptions to Gift and Exceptions to Gift Limits	Narrow the home hospitality rule
<u>18944</u> Gifts to an Official's or Candidate's Immediate Family	Clarify "direct personal benefit"
<u>18945</u> Source of Gifts	Simplify. Difficult for the official to apply rule
<u>18946.4</u> : Reporting and Valuation of Gifts: Tickets Provided by Nonprofit and Political Organizations for Their Fundraising Events	Simplify rule applicable to the gift of tickets from nonprofits
<u>§82015/18215</u> : Contribution	Clarify how behested payment rule applies to an official who is listed on a fundraising letterhead. Possibly define "at the behest" more narrowly for purposes of the behested payment reporting.
<u>§86112.5/82028(b)(2)</u>	Align the gift notification requirement in 86112.5 with the 30 day return rule for gifts
<u>§89001/18901</u> : Mass Mailings Sent at Public Expense	Apply mass mailing rules to websites
Codification of letter advice	Codify the gift exception for bona fide dating relationships
Proposed new rule	Create an exception for reciprocal lunches (treat as a reimbursement of the gift within the 30 days)

April 14 General Suggestions
Eliminate paper campaign filings
Improve Lobbyist report accessibility and ability to search online
Create an electronic filing system for Form 700s



June 9, 2011

Commission Chair Ann Ravel
Commissioners Eskovitz, Garrett, Montgomery and Rotunda
Fair Political Practices Commission
428 J Street, Suite 800
Sacramento, CA 95814
Via e-mail and Fax (916-322-6440)

RE: Agenda Item 21

Commission Chair Ann Ravel and Commissioners,

Alliance for Justice (AFJ) thanks the Commission for devoting so much staff time to collecting input from the regulated community in establishing the Commission's regulatory agenda for the next two years.

AFJ is a national association of over 100 organizations, representing a broad array of groups committed to progressive values and the creation of an equitable, just, and free society. AFJ is the leading expert on the legal framework for nonprofit advocacy efforts, providing definitive information, resources, and technical assistance that encourages organizations and their funding partners to fully exercise their right to be active participants in the democratic process.

While we know the Commission is still in the process of collecting input from the public on the regulatory agenda, we urge the Commission to include the following issues on its regulatory calendar.

1. Campaign Reporting for Multi-Purpose Organizations – Regulation 18215(b)(1)¹

We encourage the Commission to include on its regulatory agenda a regulation requiring multi-purpose organizations that qualify as recipient committees to report those donors who most likely contributed money to support the organization's political activities.²

¹ Specifically, regarding when a donor "knows or has reason to know" his or her donation will be used to support or oppose political activities (including supporting and opposing ballot measures).

² Although our comments apply generally to all political activities of multi-purpose organizations, since we primarily work with nonprofit organizations on ballot measure advocacy, we will focus our comments on those activities.

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In particular, we encourage the Commission to explore a regulation that:

- Focuses on requiring multi-purpose organizations to report only those donors who most likely contributed money to support the organization's political activities. The reporting required under current regulation 18215(b)(1), and Commission guidance, provides the public with inflated and inaccurate information about who is supporting political activities. For example, under the current rules, a multi-purpose organization may be required to disclose the next check that comes through the door – even if that donor does not actually support the goals of the organization's ballot measure work and even if the donation was solicited and promised long before the organization started/planned engaging in ballot measure activity. This may result in the organization reporting donors who clearly did not intend to support its ballot measure work – including bequests, foundation grants for specific projects that do not involve ballot measure activity, foundation grants that have been restricted from being used on lobbying, or donations from individuals who oppose the organization's view on a ballot measure (e.g., an individual that is opposed to gay marriage but donates to a nonprofit that is opposing Proposition 8);
- Develops criteria or factors for rebutting the "knows or has reason to know" presumption in 18215(b)(1) – as was suggested in *California Pro-Life Council, Inc. v Randolph* (2007) 507 F.3d 1172, 1185. Specifically, we suggest the Commission develop a way to exclude those donations made by individuals who did not intend to support the organization's ballot measure advocacy, including those scenarios discussed above;
- Addresses the fact that the current regulations unwittingly turn donors to multi-purpose organizations into Major Donors. For example, an individual, foundation, or business may become a Major Donor under California law by donating money to a project of a multi-purpose nonprofit organization that is entirely distinct from the organization's ballot measure work – even if the donor did not know the organization was involved in any ballot measure effort at all;
- Recognizes the fact that many (if not most) multi-purpose organizations rely upon existing funds in the organization's bank account when making decisions about what ballot measure activities the organization will engage in during the election season – rather than relying on donations made immediately prior to or during the organization's involvement in ballot measure activities;
- Addresses the fact that many multi-purpose organizations become recipient committees by donating staff time or resources to a ballot measure campaign. In particular, we encourage the Commission to consider the complications of determining when an organization has taken a "second bite at the apple" and the recordkeeping burdens associated with reporting expenses under these circumstances;

- Acknowledges that a multi-purpose organization might not receive any new funding during an election-cycle or a reporting period – and might not have any new donations to report on campaign reports. Most small and mid-sized nonprofit organizations raise money on particular cycles, with the majority of funding coming toward the end of the year or in connection with an annual luncheon or major event – so the organization may go weeks or months without receiving a single new donation;
- Offers consistency with Regulation 18413; and
- Reconsiders how multi-purpose organizations fit within the scope of regulation 18247.5, given that, by their very nature, these organizations exist for a variety of purposes and activities.

2. Revisit the Thresholds for Filing Lobbying Reports

We encourage the Commission to review and update its regulations relating to reporting lobbying activities for in-house employees of nonprofit organizations (as well as other entities and individuals) that qualify as either Lobbyist Employers or \$5,000 Filers. We specifically encourage the Commission to:

- Address when a non-lobbyist employee's time must be tracked and reported for preparatory efforts for lobbying – including time spent researching and analyzing legislative and administrative actions. Under the current regulations, organizations are now reporting time spent working on any legislative or administration action that does now, or could ever, exist. This is confusing, costly to comply with, and hyper-inflate the amount of money that is actually being spent to influence the policy process. To address this problem, the Commission may consider allowing nonprofit organizations to rely upon the definitions of direct lobbying included in the IRS regulations, which is currently allowed under the federal Lobbying Disclosure Act.
- Clarify when time spent communicating with the public on legislative and administrative actions in a way that does *not* encourage the public to take action on the item, must be tracked and reported. By way of example, under the current regulations and advice letters, an organization that distributes a 200+ page report on the state's initiative process or voter registration laws, that also includes suggestions for how to improve the law to make the process better, would arguably need to report the entire cost of researching, preparing, and distributing the report as a lobbying expense – even though only a small fraction of the report is devoted to legislative solutions – if the organization's purpose in preparing the report is more than "academic." (Kelso Advice Letter, FPPC No. A-97-151.) Since the costs for preparing and distributing this type of report could range in the thousands (to hundreds of thousands), the public will have a significantly inflated impression of how much this organization spent on lobbying activities.

To address this problem, the Commission may consider allowing nonprofit organizations to rely upon the definitions of grassroots lobbying included in the IRS regulations, which is currently allowed under the federal Lobbying Disclosure Act.

- Make consistent the rules on when traveling to attend hearings must be tracked for both in-house lobbyists and in-house employees that spend 10% or more of their time in a calendar month on lobbying;
- Increase the percentage of time (from the current 10%) an in-house employee of an organization must work before the individual's time must be reported as an Other Payment to Influence – to require reporting only the time spent by the individuals who are most significantly engaged in influencing state public policy;
- Clarify the definitions used in the lobbying regulations, some of which are contradictory and confusing. For example, the definition of Qualifying Official in regulation 18239(d)(5) is not consistent with the concept of which officials are covered by the Act in regulation 18616(a)(4) subsections (b) and (c);

We also encourage the Commission to address when grants made by public foundations, private foundations, and grantmaking public charities, to multi-purpose organizations must be reported by the grantmaking organization as Other Payments to Influence on a \$5,000 Filer report. Addressing this issue is particularly important because, under federal tax law, some foundations are prohibited from funding or engaging in lobbying – and filing California lobbying disclosure reports may expose the foundation to potential investigation by the IRS. This chills some foundations from supporting grantees that lobby, even if the foundation does not intend to support that grantee's lobbying activities. Additionally, current Commission advice on this issue results in significant over-reporting by grantmaking organizations. We encourage the Commission to pursue a regulation that builds off of the federal tax law rules on this topic. Basing the regulations on the laws that grantmaking organizations are already familiar with will maximize the potential for compliance by these organizations.

Specifically, we hope the Commission will:

- Repeal the current rules articulated in the Muller Advice Letter, FPPC No. A-92-229, which specifies that a general support grant that is not earmarked for lobbying must be reported by the grantmaking organization if it is "aware" that some portion of the funds may be used to influence legislative or administrative actions. We encourage the Commission to pursue a regulation that mirrors federal tax law and clarifies that nonprofit grantmaking organizations that provide grant funds for the general support of a grantee and are not earmarked for lobbying activities are not required to be reported;
- Incorporate into its regulations the "multi-funder project grant rules" articulated in federal tax law (discussed in more detail in the attached fact sheet). This would

allow a funder to support only the non-lobbying portion of a project that is funded by multiple funders without having to file lobbying reports.

Thank you again for offering this opportunity to address the Commission regarding its regulatory agenda. We look forward to continuing to work with the Commission and its new Chair on these issues in the coming year.

Sincerely,

A handwritten signature in black ink, appearing to read 'Melissa Mikesell', written over a horizontal line.

Melissa Mikesell
West Coast Director and Senior Counsel
Alliance for Justice, West Coast Office

Private and Public Foundations May Fund Charities that Lobby

501(c)(3) public charities may legally seek to influence legislation—in other words, lobby – subject to generous limits. In addition, private foundations and public foundations (which are public charities) may support public charities that lobby. Foundations should follow the following rules when making grants to grantees that lobby.

Private foundations may not earmark funds for lobbying. A grant that is “earmarked” for lobbying creates a taxable expenditure for the private foundation. A grant is considered earmarked for lobbying if it is conditioned upon an oral or written agreement that the grant be used for lobbying purposes. However, this does not mean that private foundations must require grantees to refrain from using grant funds for lobbying. In fact, a grant agreement that forbids use of the funds for lobbying is unnecessarily restrictive. For more information on why restrictive grant clauses are not legally required, click here: http://www.afj.org/assets/resources/nap/grant_agreements.pdf.

Public foundations may earmark funds for lobbying. A grant that is earmarked for lobbying will count against the public foundation's lobbying limit (and be treated as a lobbying expenditure). Generally, such earmarked grants will be double counted—against the lobbying limits of both the public foundation and by the public charity receiving and spending the money.

Additional Rules for Private and Public Foundations (Safe Harbors). Both private foundations and public foundations that have made the 501(h) election may make two types of grants that avoid creating, respectively, taxable or lobbying expenditures – general support and specific project grants – while permitting grantees flexibility in the use of their funds.

A **general support grant** is not earmarked for a particular purpose and specifically is not earmarked to be used in an attempt to influence legislation. The public charity grantee may use the grant funds for any purpose, including lobbying. If the grantee uses the money for lobbying, the grantor foundation will not incur a taxable (for private foundations) or lobbying (for public foundations) expenditure.

To make a **specific project grant**, even one for a project that includes lobbying, the foundation must review the grantee's project budget and may give a grant in an amount up to the non-lobbying portion of the budget. If the grant exceeds the non-lobbying portion of the project budget, then the foundation must treat as a taxable or lobbying expenditure the amount by which the grant exceeds the non-lobbying amount. The public charity grantee must use the grant funds only for the specific project – the grantee does not have the discretion to spend the funds on another project, even one in the same broad program area, or for general purposes. If these conditions are met, the foundation will not incur a taxable or lobbying expenditure, even if the grantee subsequently uses some of the grant money for lobbying under the designated project.

As long as a private or public foundation uses one of these two safe harbors, the foundation does not need to include a lobbying restriction in its grant. Proper use of the safe harbors protects the foundation from incurring any taxable or lobbying expenditure, even if the grantee uses the funds for lobbying.

Both private and public foundations may fund without restriction charitable activities that do not fall within the federal tax law definitions of lobbying.

What is Lobbying? There are two types of lobbying—direct lobbying and grassroots lobbying. In general, direct lobbying is a communication with a legislator (federal, state, local) or legislative staff member that refers to specific legislation and takes a position on that legislation. Direct lobbying also includes communications with the general public that refer to and state a position on ballot measures

(such as referenda, ballot measures, and constitutional amendments). Grassroots lobbying is a communication with the general public that refers to specific legislation, reflects a view on that legislation, and contains a call to action. For more specifics on the definitions of lobbying and the lobbying limits for public charities and public foundations, see Investing in Change: A Funder's Guide to Supporting Advocacy.

For more information on how to safely fund grantees that lobby or how the facts and circumstances test might apply to your particular activity, please feel free to call Alliance for Justice's toll free technical assistance line at: 866-NPLOBBY.

August 2010

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